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Supreme Court, U.S.
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No. .....

In The
Supreme Court of the United States
October Term, 1986

CITY OF LITTLE ROCK,

Petitioner,

vs.

DEBBIE WILLIAMS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the improper firing of a court clerk by a municipal judge given the discretion to hire and fire his employees establishes an unconstitutional municipal employment policy for which a municipality may be held liable under 42 U.S.C. § 1983?

LIST OF PARTIES

The parties to this case are as follows:

William Butler, Defendant

City of Little Rock Third Party Defendant/Appellant:
Cross Appellee/Petitioner

Linda Stanley, Plaintiff/Appellee/Cross Appellant/Respondent

Debbie Williams, Plaintiff/Appellee/Cross Appellant/Respondent

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

Whether the improper firing of a court clerk by a municipal judge given the discretion to hire and fire his employees establishes an unconstitutional municipal employment policy for which a municipality can be held liable under 42 U.S.C. § 1983?

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISION INVOLVED 2

STATEMENT OF THE CASE 2

REASON FOR GRANTING THE WRIT 5

This case provides the Court the opportunity to clarify whether acts of discretion by final authorities subject municipalities to liability under 42 U.S.C. § 1983 when those acts cannot be said to fairly represent general municipal policy under state law. 5

CONCLUSION 11

APPENDIX A (District Court Order) ..... App. 1

APPENDIX B (Eighth Circuit panel opinion) ..... App. 9

APPENDIX C (Eighth Circuit *En Banc* order) ..... App. 37

APPENDIX D (Eighth Circuit *En Banc* opinion) App. 39

TABLE OF AUTHORITIES

Page

City of Little Rock v. Williams, — U.S. —, 106 S.Ct. 1508 (1986) 1, 5

Jett v. Dallas Ind. School Dist., 798 F.2d 748 (1986) 6, 8, 9

Johnson v. Ballard, 644 F.Supp. 333 (N.D. Ga. 1986) 10

Monell v. Dept. of Social Services, 436 U.S. 658 (1978) 4, 7, 9, 11

National Surety Corp. v. Crystal Springs Fishing Vil., Inc., 326 F.Supp. 1171 (W.D.Ark. 1971) 10

Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981) 4

Pembaur v. City of Cincinnati, — U.S. —, 106 S.Ct. 1292 (1986) 5, 6, 7, 8, 9, 11

Polk County v. Dodson, 454 U.S. 312 (1981) 7

Praprotnik v. City of St. Louis, 798 F.2d 1168 (8th Cir. 1986) 6

Small v. City of Belfast, 796 F.2d 554 (1986) 6, 10

Williams v. Butler, 746 F.2d 431 (8th Cir. 1984) 1, 4

Williams v. Butler, 762 F.2d 73 (8th Cir. 1985) 1, 5

Williams v. Butler, 802 F.2d 296 (8th Cir. 1986) 1, 6, 8 9, 10, 11

Woodley v. Town of Nantucket, 645 F.Supp. 1365 (D.Mass. 1986) 10

STATUTES:

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1343(3) 3

42 U.S.C. § 1983 ..... 2, 3, 5, 6, 8, 11, 12

Ark.Stat.Ann. § 19-712 (Repl. 1977) 2, 7

TABLE OF AUTHORITIES—Continued

Page

RULES:

Supreme Court Rule 17.1(a) 1

MISCELLANEOUS:

Geller, "Municipal Liability Under Section 1983: A Thumbnail Sketch," 68 *Public Management* 11 (November, 1986) 6

OPINIONS BELOW

The District Court did not issue an opinion in this matter. A copy of the judgment is included in the Appendix. App. 1. The panel decision of the United States Court of Appeals is also included in the Appendix. *Williams v. Butler,* 746 F.2d 431 (8th Cir. 1984); App. 9. After granting a petition for rehearing, the Court was divided equally and only issued an order. *Williams v. Butler,* 762 F.2d 73 (8th Cir. 1985); App. 36. This judgment was then vacated by this Court. *City of Little Rock v. Williams,* — U.S. —, 106 S.Ct. 1508 (1986). The opinion upon which this opinion is based was rendered on September 26, 1986. *Williams v. Butler,* 802 F.2d 296 (8th Cir. 1986); App. 38.

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JURISDICTION

The judgment of the Court of Appeals, rendered by a 7-5 vote, was entered on September 26, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Petitioner believes that this Court should grant certiorari to review a federal appeals court decision that is in conflict with a ruling on the same issue by another federal court of appeals. S.Ct. R. 17.1(a).

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STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Ark.Stat.Ann. § 19-712 (Repl. 1977) provides in pertinent part:

> A. The initial Board of Directors . . . shall employ a City Manager. . . . (d) . . . He may remove from office all officials and employees . . . provided such removal by the City Manager is approved by the Board of Directors.

—o—

STATEMENT OF THE CASE

The respondent, Debbie Williams ("Williams"), initiated an action under 42 U.S.C. § 1983 against William R. Butler ("Butler"). Williams, a former secretary and court clerk, alleged that Butler had unconstitutionally terminated her employment because she had provided information to a grand jury investigating corruption in Butler's court. Butler was one of two elected municipal court judges for the City of Little Rock ("City"). Linda Stanley ("Stanley"), who is no longer a party to this action, was also a municipal court clerk.

In 1981 the City police department began an investigation into missing traffic tickets. At some point the investigation targeted Butler as a possible suspect. During this period of time, Williams gave the police department a statement accusing Butler of having destroyed certain tickets. She also testified before a county grand jury. Shortly after her grand jury testimony, Butler terminated her employment.

(Stanley also testified before the grand jury. However, she was never terminated. She left her job with the municipal court alleging that she was constructively terminated as a result of her mistreatment by other court employees).

The § 1983 action was filed in the United States District Court for the Eastern District of Arkansas. It alleged that Butler had violated Williams' and Stanley's first amendment rights. Jurisdiction of the District Court was invoked pursuant to 28 U.S.C. § 1343(3), and remedies were sought pursuant to 42 U.S.C. § 1983. Williams and Stanley only sued Butler in his official capacity.

Butler later cross claimed against the City alleging that it should pay any judgment entered against him. The City denied liability. Its defense contended that Butler's decision to fire Williams was a matter of discretion that did not constitute any policy, custom or practice of the City. Further, the City contended that any authority Butler may have had as a result of this discretion was exceeded by this aberrant act.

The matter was tried before a jury. However, before the issues were submitted to the jury the District Court

ruled, as a matter of law, that the City was responsible for any damages assessed against Butler. This ruling was timely objected to by the City.

The jury returned a verdict against Butler in favor of Williams for $40,000.00 in compensatory damages, and $60,000.00 in punitive damages. Because the Court had ruled the City would have to pay any damage award against Butler, the punitive damage award was set aside in light of this Court's decision in *Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981). The District Court also assessed Williams' attorneys' fees and costs against the City pursuant to 42 U.S.C. § 1988. The jury returned a verdict in favor of Butler against Stanley.

The City appealed the District Court's ruling that it was *per se* liable for Butler's misconduct. Williams appealed the setting aside of the punitive damages award. Butler and Stanley chose not to participate in the appellate process.

A panel of the United States Court of Appeals for the Eighth Circuit affirmed the District Court by a 2-1 vote. *Williams v. Butler,* 746 F.2d 431 (1984). The Court ruled that allowing Butler to hire and fire his court employees was tantamount to permitting him to establish City employment policy. Hence Butler's acts in this case were held to be the equivalent of officially promulgated policies of the City pursuant to *Monell v. Dept. of Social Services,* 436 U.S. 658 (1978). In addition to some evidentiary issues, the Court also affirmed the District Court's abolition of the punitive damage award.

The City successfully sought rehearing *en banc*. After argument, the Court affirmed the District Court judgment

by an equally divided vote. *Williams v. Butler,* 762 F.2d 73 (8th Cir. 1985).

The City then filed a petition for writ of certiorari in this Court. The petition was granted, the judgment vacated, and the matter remanded to the Eighth Circuit for reconsideration in light of *Pembaur v. City of Cincinnati,* — U.S. —, 106 S.Ct. 1292 (1986). *City of Little Rock v. Williams,* — U.S. —, 106 S.Ct. 1508 (1986).

After another *en banc* argument, the Eighth Circuit, by a 7-5 vote, once again affirmed the District Court. *Williams v. Butler,* 802 F.2d 296 (1986). On December 4, 1986, the Court stayed the mandate pending the outcome of this petition.

REASONS FOR GRANTING THE WRIT

This case provides the Court the opportunity to clarify when acts of discretion by final authorities subject municipalities to liability under 42 U.S.C. § 1983 when those acts cannot be said to fairly represent general municipal policy under state law.

A municipal judge, acting on a personal vendetta, fired a court clerk because he believed she had testified against him before a grand jury investigating corruption. The judge had been permitted the discretion of hiring and firing his court personnel. The municipality's official policy forbade the termination of an employee in the absence of just cause. The issue is whether, in permitting the judge this discretion, the City subjected itself to liability under 42 U.S.C. § 1983 for this particular firing.

The Eighth Circuit decided that permitting a city official to hire and fire employees is the equivalent of holding that his actions represent officially sanctioned municipal employment policy. *Williams v. Butler,* 802 F.2d 296 (1986); *see also, Praprotnik v. City of St. Louis,* 798 F.2d 1168 (8th Cir. 1986). The First Circuit has agreed with this rationale. *Small v. City of Belfast,* 796 F.2d 544 (1986).

However, a division exists among the circuit courts of appeals. The Fifth Circuit has concluded that municipal policy, for purposes of § 1983 liability, is not established through the discretionary acts of policymakers. *Jett v. Dallas Ind. School Dist.,* 798 F.2d 748 (1986). This Court should resolve this conflict.

By granting this petition and deciding the case on its merits, the Court will provide factfinders more direction on how to distinguish "acts of the *municipality* from acts of *employees* of the municipality." *Pembaur v. City of Cincinnati,* — U.S. —, 106 S.Ct. 1292, 1298 (1986). As it now stands, some courts do not believe that there is a majority opinion on what constitutes officially sanctioned municipal policy. *See, Small,* 796 F.2d at 553.

However, there is an even more pressing reason for the Court to grant this petition. The thousands of municipal and county governments in this Country need to know whether policy can be made, and municipalities can be held liable, as the result of any action by an official with final decisionmaking authority. Geller, "Municipal Liability Under Section 1983: A Thumbnail Sketch," 68 *Public Management* 11 (November, 1986). This case provides the Court the vehicle for answering that question.

1. If a policymakers' acts can be fairly said to represent officially sanctioned municipal policy, then a municipality may be held liable under § 1983 for the constitutional torts committed by that policymaker. *Monell v. Dept. of Social Services,* 436 U.S. 658, 690 (1978). Even one unconstitutional act, when made pursuant to government policy, is sufficient to expose a municipality to such liability. *Pembaur v. City of Cincinnati,* — U.S. —, 106 S.Ct. 1292 (1986). But, the municipal policy must be the "moving force," behind the constitutional tort. *Polk County v. Dodson,* 454 U.S. 312, 326 (1981). Merely employing a tortfeasor does not subject a municipality to liability because the doctrine of *respondeat superior* does not apply. *Pembaur,* 106 S.Ct. at 1297-98; *Monell,* 436 U.S. at 692-694.

A decisionmaker's acts subject a municipality to liability only if he possesses final authority to establish municipal policy with respect to the action ordered. *Pembaur,* 106 S.Ct. at 1298. But, does this mean that a municipality can be held liable for a constitutional tort by a policymaker acting within the scope of his discretion, but not in an area where he had been given final authority for establishing general municipal policy?

A plurality of the Court has indicated that the improper discretionary acts of decisionmakers do not subject municipalities to liability if state law[1] does not give

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[1] Under the Arkansas law applicable to the City, the city manager is the final authority for municipal employment policy. Ark.Stat.Ann. § 19-712 (Repl. 1977). The record in this case is devoid of any attempt by Williams to seek help from the City Manager.

them final authority for establishing municipal policy in a particular area. *Pembaur,* 106 S.Ct. 1300, n.12.

> Thus, for example, the County Sheriff may have discretion to hire and fire employees without also being the county official responsible for establishing county employment policy. If this were the case, the Sheriff's decisions respecting employment would not give rise to municipal liability, although similar decisions with respect to law enforcement practices, over which the Sheriff *is* the official policymaker, *would* give rise to municipal liability. Instead, if county employment policy was set by the Board of County Commissioners, only that body's decisions would provide a basis for county liability.

It is on precisely the meaning of this statement that the Eighth Circuit was divided in this case, and the Eighth and the Fifth Circuits have split. Indeed, until this Court further defines the kinds of policy decisions that subject municipalities to § 1983 liability, disparate results on closely identical facts will continue to occur. Hence, there will be no consistency in deciding what types of policymakers possessing what degree of authority subjects municipalities to liability.

The Eighth Circuit has, in effect, concluded that granting a department head the discretion to hire and fire his employees is the equivalent to making him the final authority for municipal employment policy within that isolated area. *Williams v. Butler,* 802 F.2d at 301. The Fifth Circuit, however, read *Pembaur* more broadly.

In *Jett v. Dallas Ind. School Dist.*, the factual dispute was whether a coach was improperly tranferred to another school because of his statements and actions concerning his football team. The coach claimed he was the victim of retaliatory action because he had exercised his rights

under the First Amendment. Liability of the school district was based upon the discretion granted the superintendent to make transfer decisions. The Fifth Circuit reversed a finding that the school district was liable even though it was undisputed that the superintendent had this authority.

> . . . *Pembaur* . . . seems to indicate that the mere fact that an official has discretionary, and inferentially final, authority to make particular concrete decisions in a given area does not necessarily mean that the official is a policymaker with respect to that area or those decisions . . . . If the latter statement is a correct reading of *Pembaur,* then Wright's final exclusive authority to make discrete individual transfer decisions would not alone subject the DISD to responsibility for his actions in the case of a particular individual transfer decision *unless* he *also* had final authority with respect to general DISD transfer *policy* applicable to teachers and coaches. *Jett,* 798 F.2d at 760 [Emphasis supplied].

Unlike the Eighth Circuit, the Fifth Circuit holds that for a municipality to be liable, the policymaker must have authority to make general, as opposed to specific, policy decisions. The resolution of this conflict is a strong reason for granting the writ in this case.

The Fifth Circuit's view of what constitutes official policy comports with the *Monell* characterization of municipal policy. *Monell,* 436 U.S. at 690. The Eighth Circuit permits official policy to be more easily established. This Court should take this case and identify the principles for determining when policy is made.

This fact is particularly true in light of the impact that *Williams* has already had on the jurisprudence in this

area. The First Circuit relied upon *Williams* for its rationale in *Small.* So have District Courts throughout the Country. *See, e.g., Woodley v. Town of Nantucket,* 645 F.Supp. 1365 (D.Mass. 1986); *Johnson v. Ballard,* 644 F.Supp. 333 (N.D.Ga. 1986).

2. A second reason this writ should be granted is that it permits the Court to determine if the *ultra vires* acts of decisionmakers can fairly be said to represent officially sanctioned municipal policy. Or, even if Butler possessed certain authority, could it honestly be said that he was given authority to choose clearly illegal alternatives in deciding to terminate an employee?[2] If not, should the City be held liable for such acts?

As municipal judge, Butler had authority to supervise the operation of the municipal court. Included within this authority was the ability to hire and fire his personal court staff. Even if it could be said that he was delegated authority to establish municipal employment policy for the municipal courts, it cannot be said that he was granted the authority to act contrary to established local policy.

The officially promulgated City employment policies provided that no employee would be discharged "except for just cause." Art. IV § 2 City Ex. 4. [R. 493] Clearly this retaliatory firing was contrary to local policy when it occurred. Just as clearly, any authority delegated to Butler

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[2] By analogy, corporations are not liable for the *ultra vires* acts of directors. *See, National Surety Corp. v. Crystal Springs Fishing Vil., Inc.,* 326 F.Supp. 1171 (W.D.Ark. 1971). Since Butler was, at best, an officer of the municipal corporation of Little Rock, it is clear that he was expected to act in accordance with corporate policies. If he acted contrary to those policies, the corporation should not be liable for his actions.

did not include the right to act contrary to City policy. Hence, Butler had no authority to make the particular decision he did. Yet, on the basis of his aberrant act the City was held liable under the *Monell* policy theory of § 1983 liability.

A reason to grant the writ, then, is so this Court can state whether a municipality should be subjected to § 1983 liability for the acts of a decisionmaker that are clearly contrary to officially promulgated local policy. A majority of the Eighth Circuit has evidently answered this question affirmatively. *Williams v. Butler; but see, Pembaur*, 106 S.Ct. at 1301 (White, J., concurring); *see also, Williams v. Butler*, 802 F.2d at 304 (Ross, J., dissenting).

CONCLUSION

While *Monell* and *Pembaur* have defined certain parameters of § 1983 liability for the actions of policymakers, additional questions must be addressed. The circuit courts of appeals are split on the meaning of what constitutes authority to make binding municipal policy. Additionally, the question is raised of whether acts that are clearly contrary to local policy can ever be said to fairly represent a municipal policy, custom or practice.

For the reasons set forth above, this petition for writ of certiorari should be granted. By granting the petition and considering this case on its merits, the Court will be

given the chance to further define the parameters of municipal liability under 42 U.S.C. § 1983. Moreover, the Court can assure that courts, litigants and local governments will know when the act of a decisionmaker constitutes municipal policy.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

NO. LR C 81 633

DEBBIE WILLIAMS AND LINDA STANLEY
PLAINTIFFS

VS.

WILLIAM R. BUTLER, JUDGE, AND CHIEF ADMINISTRATIVE OFFICER OF THE LITTLE ROCK MUNICIPAL COURT—TRAFFIC DIVISION
DEFENDANT

WILLIAM R. BUTLER
THIRD PARTY PLAINTIFF

VS

CITY OF LITTLE ROCK
THIRD PARTY DEFENDANT

MEMORANDUM AND ORDER
(Filed on August 17, 1983)

On July 20, 1983, the jury returned verdicts in this case. A number of issues remained unresolved, however, and this memorandum constitutes the findings necessary to conclude the case.

The resolution of the issues is complicated by the puzzling positions taken by the City of Little Rock. Originally, the plaintiffs sued "William R. Butler, Judge and

Chief Administrative Officer of the Little Rock Municipal Court Traffic Division." Although claims were made against Judge Butler only in his official capacity, and never as an individual,[1] the City declined to assume the defense of the case or accept any responsibility for his actions.

Butler filed a motion for leave to file a third party complaint against the City contending that, inasmuch as the claim against him was for his actions in his official capacity and not as an individual, he should have judgment over against the City for any sums adjudged against him and the City should have to assume the defense of the case.

In response to the motion, the City, although not a party, filed a pleading on January 21, 1983, asking the Court to deny Butler's motion for leave to file the third party complaint. In that pleading, the City contended it could not be liable because if Butler acted as alleged in the complaint he was acting outside his authority in an *ultra vires* role for which the City was not responsible and, alternatively, if he was not guilty of the conduct alleged, there was no liability on the part of the City since Butler would have no liability. Furthermore, and even more interesting in light of later defenses raised by the City, the City said a defense of Butler by it posed a conflict of inter-

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1. Although it is common to sue defendants "individually, and in their official capacity", the plaintiffs apparently elected to sue Butler only in his official capacity. The Court can only assume the decision was deliberate on the part of the plaintiffs since the fact that no claim was asserted against Butler individually was discussed at pretrial; the point is made in the pleadings; and, during the jury selection process, the omission of any claims against him individually was mentioned.

est problem because the plaintiffs and Butler were *all officers or employees of the City.*

When, however, the City filed an answer to Butler's third party complaint, it ignored its previous allegation that a potential conflict existed because all parties were employees of the City, and claimed that the plaintiffs were not employees of the City, but were "key staff or personal staff of defendant." The contention apparently has its foundation in the fact that the Arkansas legislature created the positions occupied by plaintiffs by state statute. *See, Ark. State. Ann.* § 22-704.1(44) (Supp. 1981). Further, the City denied that plaintiffs were "employees within the meaning of Title VII—Civil Rights Act of 1966, as amended" even though no claim was asserted under Title VII.

The City also "counterclaimed" against Butler seeking a declaratory judgment that plaintiffs were not employees of the City, but were, in fact, "personal staff of defendant Butler." In the alternative, and in the event plaintiffs were declared employees of the City, the City seeks a declaration that Butler must comply with the procedures of the City for hiring and terminating employees in the positions formerly occupied by plaintiffs.

At the conclusion of the evidence, the Court concluded that, as a matter of law, the plaintiffs were employees of the City when they occupied their jobs at the Little Rock Municipal Court; that Judge Butler was the duly elected Municipal Judge of the City and, at relevant times, was an elected official of the City; that Judge Butler acted in his "official capacity" and within the authority delegated to him by the City if he, in fact, terminated

plaintiffs; and that the City would be liable for any compensatory damages and equitable relief granted plaintiffs. Although the Court did not state the specific factual basis for the rulings on the record since it was a jury trial, the pending issues perhaps require some explanation of those rulings.

The City's claim that plaintiffs were not employees of the City apparently rests upon the fact that their positions were authorized by state statute and Judge Butler hired and terminated people who occupied those positions.[2] The fact that the positions were creatures of state statute is meaningless. Many city and county jobs are created by state statute and minimum and maximum salary levels established by state legislation. Nevertheless, the City and County employees are hired and fired by the local entity; they draw their paychecks from the local entity; and their work, conditions of employment and fringe benefits are controlled by the local entity. In this case, the undisputed facts are that plaintiffs were hired by Judge Butler, an official of the City; he controlled and supervised their work; they were paid by the City; they were processed through the City personnel office when they were hired; they were given City parking places; and they worked in the City owned Police and Courts Building. The authority to make employment decisions was given to Butler by the City personnel office when Butler took office a number of years ago. In any event,

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2. There is some question as to whether the City should be permitted to raise this issue in light of its initial claim that it should not be a party to the case because plaintiffs and defendant were *all* City employees and a conflict would exist if the City were a party.

the fact that Butler decides who is hired or fired does not change the status of that person from employee of the City to "key staff or personal staff employee" of Butler. The Court is not clear what significance that phrase has in any event, or what relevance Title VII might bear to the issue. In summary, plaintiffs were employees of the City, and there is no evidence from which an inference can reasonably be drawn to the contrary.

The Court need not reach the question presented by the City's request for a declaratory ruling that Judge Butler must comply with City personnel procedures in hiring and terminating employees. It is an issue which can be resolved by state law and, with respect to the issues in this case, is merely an advisory ruling.

Debbie Williams Claims

The jury returned a verdict in favor of Debbie Williams on her complaint and assessed her damages at $40,000 compensatory and $60,000 punitive. The jury also returned a verdict in favor of Williams on the counterclaim of Butler.

The first question is whether, in light of *Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981), the award of $60,000 for punitive damages can stand against Butler and the City, since Butler was not sued as an individual, but only in his official capacity. The argument is made that the defendant waived any objection to punitive damages by failing to specifically object to the submission of the issue to the jury. The objection to the assessment of punitive damages was not waived by the defendant. The Court understood that both Butler and the City of Little Rock consistently claimed they were not liable for damages, compensatory or punitive.

The Court and the parties were aware of the *City of Newport* case, and it was mentioned as the jury instructions were assembled. The punitive damage issue was submitted to the jury solely because of the practice suggested in *Parker v. Seaboard Coastline Railroad*, 573 F.2d 1004 (8th Cir. 1978).[3] Furthermore, the plaintiffs in the *City of Newport* case relied upon a similar claim of waiver and the argument was rejected by the Supreme Court.

Since Butler was sued in his official capacity only (which is, in effect, a suit against the City), and any judgment will be paid from City funds, Debbie Williams is entitled to judgment for $40,000 in compensatory damages, but she is not entitled to judgment for punitive damages.

Debbie Williams also seeks the equitable remedy of reinstatement, or at least the option of reinstatement for a period of six months. Ordinarily, she would be entitled to reinstatement, but there are circumstances in this case which require denial of that equitable relief. First, Mrs. Williams was a member of a staff of five people who necessarily worked in close proximity with each other. It is inconceivable that Judge Butler or any of his remaining staff who testified at trial could co-exist with Mrs. Williams on a daily basis, much less conduct the business of the Municipal Court, if forced to work together. The jury awarded an ample amount of compensatory damages,

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3. There was sufficient evidence to submit the element of punitive damages to the jury. The issue was submitted to make the record complete and obviate the need for retrial in the event a judgment notwithstanding the verdict was entered and subsequently reversed.

and, obviously, never thought that Mrs. Williams would rejoin the Municipal Court staff. Perhaps more important, however, is the fact that in closing argument Mrs. Williams' attorney argued to the jury that her past loss of compensation would "continue in the future." Although future wage losses were not an element of damage, the argument was made as an extension of the back pay element.

The defendants made no objection to plaintiff's reference in argument to future disparity in the Clerk's pay rate and the amount Mrs. Williams is paid at her present job, and the Court did not, on its own initiative, call the jury's attention to the fact that future wage losses were not an element of damage. Under the circumstances, there is a reasonable basis for concluding the jury considered future losses in calculating Williams' compensatory damages. All things considered, the Court does not believe reinstatement is an appropriate remedy in this case.

Williams is, of course, entitled to recover a reasonable attorney's fee.

Linda Stanley

The jury returned a verdict for Butler on the complaint of Linda Stanley and in favor of Stanley on the counterclaim of Butler.

Stanley also requested the equitable remedy of reinstatement. Insofar as independent findings by the Court are necessitated by the claims for equitable relief, the Court agrees with the conclusions reached by the jury. The Court does not believe that Stanley established by a preponderance of the evidence that she was "constructively

discharged'' because she exercised her First Amendment rights of free speech.

Judgment should be entered in favor of Butler on the complaint of Stanley and in favor of Stanley on the counterclaim of Butler.

Third Party Complaint Against the City

With respect to Butler's third party complaint, he seeks judgment over against the City for any sums adjudged against him. Since the judgment is against Butler in his official capacity only, it is perhaps merely an academic exercise to grant such relief. Nevertheless, for purposes of the record and the judgment in the case, Butler is granted judgment against the City for the sums awarded Debbie Williams.

Butler also claims that he is entitled to approximately $15,000 in attorneys' fees because the City refused to provide him with a defense to the complaint. Perhaps the City has a moral or practical obligation to defend its officials or employees who are sued for acts committed in their official capacities, but the Court is not aware of any legal obligation to provide such a defense. Since there is no legal or statutory basis for concluding that Butler is entitled to recover his attorneys' fees, the Court will follow the *American* rule and deny his claim for those sums.

Judgment shall be entered in accordance with these findings and conclusions.

Dated this August 17, 1983.

/s/ William R. Overton
United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 83-2534

No. 83-2641

Debbie Williams and Linda Stanley,

Plaintiffs/Appellees/
Cross-Appellants,

v.

William R. Butler,

Defendant,

v.

City of Little Rock, Arkansas,

Third-Party Defendant
Appellant/Cross-Appellee.

Appeal from the United States District Court
for the Eastern District of Arkansas.

Submitted: June 11, 1984

Filed: October 15, 1984

Before BRIGHT, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and McMILLIAN, Circuit Judge.

FLOYD R. GIBSON, Senior Circuit Judge.

The defendant, the City of Little Rock (City), appeals from a jury verdict in favor of the prevailing plaintiff,

Debbie Williams, awarding her compensatory damages under 42 U.S.C. § 1983 (1982), for a violation of her First Amendment rights by defendant Butler, a municipal judge. We affirm, but remand for a consideration by the district court of the supplemental motion for costs and attorneys' fees submitted by the plaintiffs.

I. Facts

Butler was a duly elected municipal judge for the traffic court of the City of Little Rock. The plaintiffs in this action, Debbie Williams and Linda Stanley, were hired by Butler as clerks for this court. All three parties were employees of the City. Both of the plaintiffs, at different times, saw Butler deliberately destroy traffic tickets. Williams disclosed this event to the police. After Butler became aware that Williams had made a statement to the police, he fired her. Stanley was subpoenaed before a grand jury which was investigating possible corruption in the municipal traffic court, and she disclosed that she had seen Butler destroy traffic tickets. Stanley made two other appearances before the grand jury. Allegedly, after these appearances, Stanley was harassed by her co-workers to such an extent that she felt compelled to resign.

Both plaintiffs filed § 1983[1] actions against Butler in his official capacity.[2] Butler brought a third party complaint against the city, seeking judgment against the City for any sums adjudged against him. The jury returned a verdict in favor of Williams, awarding her $40,000.00 in compensatory damages and $60,000.00 in punitive damages. The jury returned a verdict in favor of Butler on Stanley's § 1983 claim, and the court found in favor of Butler on his third party complaint against the City. The district court awarded Williams attorney fees, but did so only after reducing the award by 25% to account for Stanley's complete failure to prevail on her claim. On the basis of *Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981), the district court set aside the punitive damage award the jury had returned for Williams. The City is appealing the district court's finding in favor of Butler on his third party complaint, and Williams is appealing the dismissal of the punitive damage award and the reduction in the requested amount of attorney fees.

II. Discussion

A. The City's liability.

The City argues that it is not liable for the unconstitutional acts of its employee, Butler. It is not disputed

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[1]42 U.S.C. § 1983 (1982) provides in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[2]Suits brought against individual officers in their official capacities are, in effect, suits against the City. *Monell v. Department of Soc. Servs.*, 436 U.S. 658, 690 n. 55 (1978); *see also Hutto v. Finney*, 437 U.S. 678, 700 (1978).

that, by firing Williams, Butler violated Williams' First Amendment rights. Rather, the City argues that Butler's action was not taken pursuant to City policy, nor was Butler a city "official" for purposes of § 1983. We hold that, under our reading of *Monell v. Department of Soc. Servs.*, 436 U.S. 658 (1978), the City is liable for Butler's unconstitutional act.

In *Monell,* the Supreme Court reversed, in part, its earlier decision in *Monroe v. Pape,* 365 U.S. 167 (1961), and held that local governments are not "wholly immune from suit under § 1983." *Monell,* 436 U.S. at 663. The Court held as follows:

> Our analysis of the legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress *did* intend municipalities and local government units to be included among those persons to whom § 1983 applies. Local governing bodies, therefore, can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers. Moreover, although the touchstone of the § 1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution, local governments, like every other § 1983 "person" by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental "custom" even though such a custom has not received formal approval through the body's official decision-making channels.

Id. at 690-91. However, the Court upheld the part of *Monroe* which held that a municipality will not be liable "solely because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory." *Id.* at 691. "Instead, it is

when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Id.* at 694.

Thus, under *Monell,* we need to address two questions in order to determine the City's liability in this case. First, we need to determine whether Butler's act of firing Williams implemented or executed a policy statement, ordinance, regulation, or decision adopted and promulgated by the City's governing body. If not, we need to decide whether his unconstitutional act was taken "*pursuant* to governmental 'custom' even though such a custom" had not received formal approval through the City's official decisionmaking channels. *Id.* at 691 (emphasis added). In other words, we need to determine whether, in executing a City custom, Butler inflicted an injury of constitutional dimensions. *See id.* at 694.

As a threshold matter, we note that we must view the evidence in the light most favorable to Williams, the party for whom the jury returned its verdict. *Trace X Chem. Inc. v. Canadian Indus. Ltd., No.* 83-1847, slip op. at 4 (8th Cir. June 29, 1984). At trial, Williams did not introduce any evidence of a formal policy statement, ordinance, regulation, or decision adopted and promulgated by the City's governing body. Thus, it is clear that Butler did not act pursuant to any of those modes of authority when he fired Williams.

Williams was the only party who introduced evidence regarding whether Butler acted pursuant to governmental custom when he fired Williams. Butler had been elected as a municipal court judge in 1969. He has served in that

capacity for fifteen years. In 1969, according to his own testimony, Butler went to see the City's personnel director regarding how he was to go about getting a staff. The personnel director told him that traditionally the courts had been responsible for hiring and firing their own employees.

The district court found specifically that even though Butler's employees were processed through the City personnel office when they were hired, paid by the City, given City parking places, and worked in City buildings—Butler hired his own employees, and controlled and supervised their work. In other words, Butler was making employment decisions for the City. The district court also found that the City personnel office had given Butler authority to make employment decisions when he had assumed his office. There was no evidence to the contrary. Thus, we think it is clear that the City, by custom and practice for at least fifteen years, had established a policy of giving municipal judges *carte blanche* authority to make their own personnel decisions. It equally is clear that Butler acted pursuant to this policy when he fired Williams.

The determinative issue in this case is whether Butler's unconstitutional decision and act were sufficient to render the City liable under § 1983. In other words, we must determine whether Butler's unconstitutional act was within the meaning of the language used by the Supreme Court when it wrote: ". . . it is when *execution* of a government's policy or custom . . . inflicts the in jury that the government as an entity is responsible under § 1983." *Monell,* 436 U.S. at 694 (emphasis added). This precise issue is a difficult one, and appears to be a novel question

in this circuit. The Fifth Circuit appears to have been the first circuit to address this question squarely and, indeed, it paved a path which several other circuits have chosen to follow.

In *Familias Unidas v. Briscoe*, 619 F.2d 391 (5th Cir. 1980), the Fifth Circuit considered the liability of a state and a school board for a county judge's enforcement of an unconstitutional state statute. Because the county judge drew his authority from the state, only the school board could be held liable for the judge's actions. *Id.* at 404. In the process of reaching this conclusion, the court considered under what circumstances a county official's actions could be said to represent "official policy" for purposes of liability under § 1983. The court concluded that, at least in the areas in which a local governmental official, alone, is the "final authority or ultimate repository of . . . power," that official's "conduct and decisions must necessarily be considered those of one 'whose edicts or acts may fairly be said to represent official policy' " for purposes of § 1983.[3] *Id.* The Second,[4] Third[5] Fourth,[6] Ninth,[7]

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[3]The Fifth Circuit has followed this holding in a variety of circumstances. *See, e.g., Hart v. Walker*, 720 F.2d 1436, 1445-46 (5th Cir. 1983), (county would be liable for a county supervisor's acts if supervisor was the final authority on the issue—remanded for a factual determination of final authority); *Bowen v. Watkins*, 669 F.2d 979, 989-90 (5th Cir. 1982) (notwithstanding an appeals process the plaintiff could have pursued, the city would be liable for a police chief's unconstitutional act if as a practical matter the chief was the final authority on the personnel determination in issue); *Schneider v. Atlanta*, 628 F.2d 915, 920 (5th Cir. 1980) (if director of the bureau of corrections had authority to make the final decision, the city would be liable for the director's unconstitutional act).

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and Eleventh[8] Circuits have followed the lead of the Fifth Circuit and adopted this legal position. However, the Fifth Circuit recently reversed its position, at least as applied to non-personnel situations or third parties. In *Bennett v. Slidell*, 728 F.2d 762 (5th Cir. 1984) (*en banc*),

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[4]*Rookard v. Health & Hosps. Corp.*, 710 F.2d 41, 45 (2d Cir. 1983) (court held the city liable for the unconstitutional discharge of employee by supervisors who had final authority on personnel decisions for the city's health and hospitals corporation).

[5]*Black v. Stephens*, 662 F.2d 181, 191 (3d Cir. 1981), *cert. denied*, 455 U.S. 1008 (1982) (court held the city liable for policy promulgated by police chief, which led to the filing of false charges by police officer against a citizen complainant).

[6]*Wellington v. Daniels*, 717 F.2d 932, 936, 937 n.6 (4th Cir. 1983) (court held that, because he was the final authority on the subject, police chief's choice and implementation of practices and procedures reflected government "policy," but evidence was insufficient to establish that chief had encouraged a policy of police brutality).

[7]*McKinley v. Eloy*, 705 F.2d 1110, 1116-17 (9th Cir. 1983) (court held city liable for unconstitutional discharge of a police officer by city manager who had final authority on personnel decisions).

[8]*Wilson v. Taylor*, 733 F.2d 1539, 1545-47 (11th Cir. 1984) (notwithstanding an appeals process plaintiff could have pursued, city was liable for police chief's unconstitutional discharge of police officer); *Berdin v. Duggan*, 701 F.2d 909, 914 (11th Cir.), *cert. denied*, — U.S. —, 104 S. Ct. 239 (1983) (city ordinance delegated final authority over city personnel decisions to mayor, so city was liable for mayor's unconstitutional discharge of city employee); *Williams v. Valdosta*, 689 F.2d 964, 969 (11th Cir. 1982) (although there was some dispute as to whether plaintiff was demoted by city ordinance or by city manager who had final authority over city personnel decisions, city was liable for plaintiff's unconstitutional demotion under either theory); *Hearn v. Gainesville*, 688 F.2d 1328, 1334-35 (11th Cir. 1982) (city not liable where final decision maker, city council, acted on false information supplied by personnel director who did not have final authority on personnel decisions).

the court held that for purposes of liability under § 1983, the local governing body itself must have acted unconstitutionally, or must have been directly responsible for the formal policy or custom pursuant to which the unconstitutional act was taken. *Id.* at 767. Further, unless a local governing body has expressly or impliedly appointed an official to act in its place, that body cannot be held responsible for the acts of that official. *Id.* at 769. Thus, even though, in *Bennett,* the acts taken by the city officials may have been unconstitutional, and even though those authorities were final authorities on the decisions in question, the city was not liable for those acts. *See id.* at 770.

In a dissenting opinion to *Bennett,* Judge Politz offerred the following reflections on the majority's opinion:

> In essence, the majority holds that any action by an appointed official that is inconsistent with the city's written ordinance is an aberrant act attributable only to that official and, therefore, that such action can never constitute official policy within the meaning of *Monell.* This restrictive interpretation effectively negates the possibility that municipal liability will ever be imposed for the unconstitutional actions of an appointed official. Indeed, under the contours defined by the majority, the instances in which an edict or act of any person not a "lawmaker" may "fairly be said to represent official policy" will seldom arise. That result is totally at odds with *Monell's* mandate that municipalities be subjected to § 1983 liability for more than the mere written words of their ordinances.

Id. at 771 (Politz, J., dissenting). Although we might be inclined to agree with Judge Politz' reasoning, we need make no decision on the validity of *Bennett,* as that case applied to an apparent aberrant act by a city official

against a third party. The case at bar deals with a City personnel decision made by a City official. However, in *Monell,* it is clear that the Supreme Court was concerned with more than the policies, including customs with the force of policy, promulgated formally by the rulemaking body of a local government, and concerned with more than the acts taken by a local governing body itself. *See Monell,* 436 U.S. at 685-86 n. 45, 691 n. 56. Indeed, the culprit for whom the city could be held liable in *Monell* was not the local governing body of the city itself, but its department of social services and board of education which were making City personnel decisions in an unconstitutional manner. *Id.* at 660-61. Further, in *Monroe,* the landmark case in § 1983 jurisprudence and the case from which *Monell* draws its force, it is clear that the Court was concerned with unconstitutional acts taken by officials in spite, and in the face of constitutionally valid laws. *See generally, Monroe,* 365 U.S. at 171-80.

In a situation where the victim of an unconstitutional employment decision and act is afforded redress by a procedure established by a local governing body, which could correct the injustice, that a body can avoid liability for the unconstitutional acts of its officials—and the victims can be made whole. *See Owen v. City of Independence,* 445 U.S. 622, 652 (1980). Under this circumstance a city would not be delegating away its ultimate authority for city employment decisions, nor would a city be abdicating responsibility for those decisions. However, where, as here, there is no internal procedure of redress for the victim of an unconstitutional act because an official has been delegated final authority on an employment decision, the responsibility for which primarily lies with the City, a local gov-

erning body must be held responsible for the acts of its officials. *See generally,* R. Freilich & R. Carlisle, *Sword & Shield,* 435-37, 461-65 (1983) (Municipalities should expect that they will be strictly liable for adverse employment decisions, especially employee terminations).

As a practical matter, local governing bodies must delegate broad authority to their officials in order to keep their corporate bodies running smoothly. However, when, as here, officials are given final authority to make decisions and to act pursuant to a city policy or custom, or in other words to be the officials vested with the ultimate responsibility for acting on behalf of the city, a city cannot be allowed to abdicate its responsibility for those decisions. Under the dissenting opinion's interpretation of the majority opinion in *Bennett,* any acts taken by these officials —regardless of their constitutionality, regardless of whether the act was taken or decision made on behalf of the City, and regardless of whether the officials had the final authority on an issue—could not be attributable to the governing body absent facially unconstitutional laws.[9] If this were the case, § 1983 and *Monell* would be meaningless.

Nor can be agree with the portion of *Bennett* that holds that governing bodies may be held liable only for

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[9]Yet the history of civil rights in this country is testimony to the reality that innocent victims often suffer discrimination at the hands of local officials who, for all practical purposes, are accountable to no one and who act in the face of constitutionally neutral laws that prohibit their conduct. Indeed, the Civil Rights Act of 1871 was passed in order to address the abuse of power by lower echelon officials. *Owen,* 445 U.S. at 650-51; *see generally, Monroe,* 365 U.S. at 171-80; *see generally Sword & Shield* at 23-28.

the unconstitutional acts of its officials of which it has actual knowledge, or which are so persistent that constructive knowledge can be imputed to the governing bodies. *Bennett*, 728 F.2d at 768. The law cannot tolerate a situation where the constitutional rights of several people must be violated before an individual victim can seek justice.

Accordingly we hold that: (1) if, according to a policy or custom established by a governing body, an official is delegated the authority, either directly or indirectly, to act on behalf of a governing body; and (2) if a decision made within the scope of the official's authority ends the matter, then the acts of the official may fairly be said to be those of the local governing body. Our holding is a narrow one. We are dealing here with an intentional, unconstitutional act taken for the City by a City official who was given final authority, pursuant to a custom established by the City through its personnel director, to make the decision which led to that act. We do not speculate beyond the precise factual situation in this case. We hold only that when a city official makes an ultimate employment decision on behalf of a city regarding a city employee, the city must be held responsible for the consequences of that decision. We wish to stress that we do not view the City's policy, of allowing municipal judges to make their own personnel decisions, as unconstitutional. The adoption of that policy clearly is within the province of the City's authority. What we take objection to is the unconstitutional act of a City employee who was, by City custom, the final arbiter on the matter.

While a city may not be held liable for the discretionary decisions of its officials, *it should be held responsible*

for the consequences of administrative decisions made for the city by those officials.[10] The facts in this case estab-

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[10]The crux of the disagreement between the majority and dissenting opinions in this case can be described as follows. The dissent believes that "the focus must always be whether the injury-inflicting act was a city policy or custom . . . . The question is not whether Butler 'customarily' hired and fired his own staff, but whether the constitutional injury-inflicting act . . . was a city custom." *See infra* at 213, 213 n.1 (emphasis added). We believe, however, that when a local governing body has established a policy or custom of allowing certain of its officials to make administrative decisions—such as an employment decision—on behalf of the body, that the focus should be on the act taken pursuant to the policy, not on the policy. *See Monell*, 436 U.S. at 691 (" . . . local governments like every other § 1983 'person' . . . may be sued for constitutional deprivations visited *pursuant* to governmental custom . . . .") (emphasis added). When an official makes a discretionary decision, however, the appropriate focus may center around whether any given act itself is a policy. The distinction between the two decisions is a difficult one to articulate, but we are not totally without guidance.

In *Polk County v. Dodson*, 454 U.S. 312 (1981), the Supreme Court held that a county was not liable under § 1983 for the discretionary decisions made by county public defenders in the representation of clients because those decisions could not be characterized as county policy. *Id.* at 326. Thus, in order for a local governing body to be held liable for the discretionary acts of its employees, it may be that the unconstitutional act itself must be a policy of the body, as the dissent in this case maintains. *See infra* at 213, 213 n.1; *see also Dick v. Watonwan County*, No. 83-1633, slip op. at 5-7 (8th Cir. July 11, 1984). We have no quarrel with this position.

However, in *Polk County*, the Supreme Court drew a distinction between administrative decisions made by officials on behalf of their local governing bodies, and discretionary decisions made by those officials.

> In concluding that [a county public defender] did not act under color of state law in exercising her professional judgment in a criminal proceeding, we do not suggest that

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lish unequivocally that, even though the City theoretically retained the primary responsibility for employment decisions, the City in fact had adopted a policy of delegating authority to the municipal judges to make certain final personnel decisions for the City. The City cannot be allowed now to escape responsibility for the consequences of an act taken pursuant to an established City policy. Butler, a municipal judge, fired Williams, a City employee, because she exercised her First Amendment rights. Under these circumstances, we hold that the City is liable for Butler's unconstitutional act.

B. The "final authority" issue.

At the close of Williams' case-in-chief, the City moved for a directed verdict which was denied by the trial court. The City characterizes this denial as error. The trial court went on to find that the City's personnel director had

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> a public defender never acts in that role. In *Branti v. Finkle*, 445 U.S. 507 (1980) . . . we found that a public defender so acted when making hiring and firing decisions on behalf of the State. It may be . . . that a public defender would also act under color of state law while performing certain administrative functions.

454 U.S. at 324-25. We think the distinction between discretionary actions and administrative actions made on behalf of a local governing body is a crucial one. It is the determining factor which: supports a finding of liability in this case; distinguishes this case from the facts and holding in *Polk County;* and distinguishes this case from the facts and holding in the opinion of this court in *Watonwan County.*

given Butler the final authority to make the personnel decisions for his court.[11] On appeal, the City argues that whether Butler was the final authority on personnel decisions in his court was a question of fact which should have been submitted to the jury. We disagree, and uphold the trial court's finding on this issue.

We need not tarry long with the City's first point. It is clear that a directed verdict is proper only when the evidence is such that reasonable people could not differ as to what the verdict should be. *Jackson v. Prudential Ins. Co.*, No. 83-1773, slip op. at 3 (8th Cir. May 31, 1984); *Rey v. Fredericktown*, 729 F.2d 1171, 1174 (8th Cir. 1984); *Crues v. KFC Corp.*, 729 F.2d 1145, 1148 (8th Cir. 1984). According to the City's brief, Williams and a witness for Williams both testified that they had been fired by Butler. Butler testified that, when he first took office in 1969, he had been given authority to hire and fire his staff by the city personnel director. There was *no* evidence to the contrary. Under these circumstances, the trial court was correct in denying the City's motion for a directed verdict.

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[11]The trial court's memorandum states as follows:

> At the close of the evidence, the Court concluded that, as a matter of law . . . Judge Butler acted in his "official capacity" and within the authority delegated to him by the City if he, in fact, terminated plaintiff; and that the City would be liable for any compensatory damages and equitable relief granted plaintiffs . . .
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> . . . .
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> . . . In this case, the undisputed facts are that plaintiffs were hired by Judge Butler, an official of the City; he controlled and supervised their work . . . . The authority to make employment decisions was given to Butler by the City personnel office when Butler took office a number of years ago.

These same circumstances lead us to conclude that the trial court also was correct in finding, as a matter of law, that Butler was the final authority on personnel decisions for his court. When the evidence on an issue leaves no room for any reasonable difference of opinion as to its resolution, the district court should resolve the issue as a matter of law. *Roesch, Inc. v. Star Cooler Corp.*, 712 F.2d 1235, 1237 (8th Cir.), *cert. denied*, — U.S. —, 104 S. Ct. 1707 (1983), *quoting, Admiral Theatre Corp. v. Douglas Theatre Corp.*, 585 F.2d 877, 883 (8th Cir. 1978); *see McGinn v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 83-1829, slip op. at 8 (8th Cir. June 22, 1984).

C. The tape recordings.

The City's Police Department was investigating the Traffic Division of the Little Rock Municipal Court in 1981. On two occasions, April 24 and May 11 of 1981, Ms. Judy Wright visited Butler's chambers and wore a body microphone to record the conversations she had with Butler and court employees on these occasions. These conversations were received and recorded elsewhere by police officers. At trial, Williams introduced these tapes, and their accompanying transcripts, into evidence. Although the tape of the April 24th conversation, exhibit no. 2, and the accompanying transcript, exhibit no. 2a, were introduced into evidence, the tape was not played for the jury nor was the transcript read by the jury. Thus, the City could hardly have suffered prejudice as a result of the trial court's admission of these exhibits into evidence. Accordingly, we confine our consideration to the objections the City raises regarding the tapes and transcript of the May 11th conversation, exhibits nos. 1, 1a, and 5.

The May 11th taped conversation, exhibit no. 1, was monitored by Lt. Plummer, a police officer. At trial, Plummer testified that he had listened to this tape, had read its accompanying transcript, and that he believed they fairly and accurately reflected the conversation which took place. Wright testified that the transcript of the May 11th conversation accurately reflected who the speakers had been. Apparently, she was not asked any other questions regarding the accuracy or authenticity of either exhibit.[12] Exhibit no. 5 was a copy of exhibit no. 1, and it had been electronically processed to remove or reduce background noise. This exhibit is the tape which was played for the jury. Prior to trial, the City made a motion *in limine* to exclude the tapes and transcripts from evidence. As to exhibits nos. 1, 1a, and 5, this motion was denied in its entirety subject to the condition that Williams provide a proper foundation for admitting the exhibits into evidence. On appeal, the City argues that Williams failed to provide a proper foundation for these exhibits, and thus they were admitted into evidence erroneously. We disagree.

As a threshold matter, we note that the admissibility of evidence is primarily a determination to be made by the trial court. We will not overturn such a determination except for a clear abuse of discretion. *United States v. Jones*, 687 F.2d 1265, 1267 (8th Cir. 1982), *quoting, United States v. Brown*, 482 F.2d 1226, 1228 (8th Cir. 1973). In *United*

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[12]The parties' briefs give differing accounts of the extent to which Wright verified the accuracy and authenticity of the May 11 tape and transcript, and neither party included the relevant parts of her testimony in the designated record on appeal. For purposes of argument, we assume that Wright failed to fully authenticate these exhibits.

States v. McMillan, 508 F.2d 101 (8th Cir.), *cert. denied,* 421 U.S. 916 (1975), we set forth the requirements for introducing tape recordings into evidence. The proponent of the tapes must establish that: (1) the recording device was capable of taking the conversation offered into evidence; (2) the operator of the device was competent to operate the device; (3) the recording is authentic and correct; (4) changes, additions, or deletions have not been made; (5) the recording has been preserved in a manner that is shown to the court; (6) the speakers are identified, and (7) the conversation elicited was made voluntarily and in good faith, without any kind of inducement. *Id.* at 104. The City attacks the exhibits on all but the first and sixth of these requirements.

Because the quality of the recording was poor, the City asks us to conclude that the tape recorder operator did not competently record the conversation; thus, the second *McMillan* requirement is not met. However, the fact that the tape recording successfully was *made* satisfies the competency requirement of the *McMillan* test. *United States v. McCowan,* 706 F.2d 863, 865 (8th Cir. 1983).

Second, the City argues that Williams failed to authenticate the exhibits. According to the City, the tapes were not authenticated because Wright testified only that the transcript of the tapes accurately reflected who the speakers were. However, Plummer, the officer who monitored this recording, testified that he had listened to the tape, read the transcript, and that both accurately reflected the conversation which took place. Along with Wright's identification of the speakers, this testimony was suffici-

ent to establish the authenticity and accuracy of the tape, *United States v. Panas,* No. 83-1909, slip op. at 13 (8th Cir. June 29, 1984), as well as its accompanying transcript. *See United States v. Bentley,* 706 F.2d 1498, 1507 (8th Cir. 1982). While perhaps it would be preferable to have the person who prepared a transcript testify to its accuracy, *see United States v. Bentley,* 706 F.2d 1498, 1507 (8th Cir. 1983), *cert denied,* — U.S. —, 104 S. Ct. 2397 (1984); *McMillan,* 508 F.2d at 105, it is unnecessary where the accuracy of the transcript is not in dispute. Aside from the general allegations that the tape was inaudible, we note that the City has not pointed out any inaccuracies in the transcript which could have led to prejudice, *Bentley,* 706 F.2d at 1507-08; *Gordon,* 688 F.2d at 44, nor did the City offer its own version of the transcript at trial, a practice followed when the content of the conversation is in dispute. *United States v. Mendoza,* 574 F.2d 1373, 1378 (5th Cir.) *cert. denied,* 439 U.S. 988 (1978), *citing United States v. Onori,* 535 F.2d 938, 948-49 (5th Cir. 1976).

Further, we note that the trial court cautioned the jury to base their verdict upon what was heard, not what was read. In addition, the trial court did not allow the jury to rely on the transcript during its deliberations. Under these circumstances, we cannot say that the admission of the transcripts was error.

Third, the City argues that Williams failed to meet the fourth requirement of the *McMillan* test—that changes, deletions, or additions had not been made—because the tape had been electronically processed in order to eliminate or reduce background noise. This contention is without merit. The engineer who processed the tape testified that

no part of the tape had been deleted, and that only sound interference had been removed from the tape. Having satisfied the trial court, this testimony was sufficient to justify admitting the tape, exhibit no. 5, into evidence and to let it be heard by the jury. *Gordon,* 688 F.2d at 44.

Fourth, the City argues that Williams failed to establish an acceptable chain of custody for the exhibits. At trial, there was inconsistent testimony between police officers as to who had the original tapes, when, and where the tapes were kept. However, it is undisputed that the originals were in the custody of the police at all relevant times.

Trial courts are entitled to assume that public officials who had custody of evidence properly discharged their duties and did not tamper with the evidence. *Panas,* No. 83-1909, slip op. at 14, *McCowan,* 706 F.2d at 865; *United States v. Weeks,* 645 F.2d 658, 660 (8th Cir. 1981), *citing, United States v. Malone,* 558 F.2d 435, 438 (8th Cir. 1977). This assumption is operative until the defendant makes a minimum showing of "ill will, bad faith, other evil motivation, or some evidence of tampering." *Jones,* 687 F.2d at 1267, *quoting, United States v. Lane,* 591 F.2d 961, 962 (D.C. Cir. 1979). Factors to be considered in a trial court's determination of the admissibility of evidence include the nature of the article, the circumstances surrounding its preservation and custody, and the likelihood that others have tampered with it. *Weeks,* 645 F.2d at 660; *Malone,* 558 F.2d at 438, *quoting, Brown,* 482 F.2d at 1228. The City did not make any showing that the evidence had been tampered with, and the police had the evidence in their custody at all relevant times. As to *McMillan's* fifth requirement, it was not error to allow the tapes and transcript into evidence.

Fifth, the City tenders a weak argument with respect to *McMillan's* voluntariness requirement. The City reasons that Wright may have so manipulated the conversation which was taped as to vitiate the voluntariness of the statements made by Butler and his employees. However, as the City concedes, there is no evidence that the parties to the conversation were under any type of duress, nor is there any evidence that Wright induced those parties to speak with her. Wright merely offered these parties an opportunity to expose their corrupt activities. *See McCowan,* 706 F.2d at 865. The parties to the conversations obviously spoke of their own free will.

Thus, all requirements of the *McMillan* test were satisfied by Williams. However, the City argues that the tape was so inaudible that it was error to allow the tape and transcript into evidence.

> The task of the trial court, in determining whether to admit tape recordings into evidence which contain inaudible portions, is to assess whether the unintelligible portions are "so substantial in view of the purpose for which the tapes are offered, as to render the recording as a whole untrustworthy."

United States v. Bell, 651 F.2d 1255, 1259 (8th Cir. 1981), *quoting, United States v. Young,* 488 F.2d 1211, 1214 (8th Cir. 1973). We have read the transcript of the tape to which the City objects. Although there are inaudible portions on the tape, they are not so substantial that they render the recording, as a whole, untrustworthy. The trial court did not abuse its discretion in admitting the tape and transcript of the May 11th conversation into evidence.

D. Improper closing remarks.

After trial, the City made a motion to modify the amount of the judgment because during closing argument, Williams' attorney improperly referred to the future monetary losses Williams would continue to suffer as a result of being fired. Future losses had not been pleaded as an element of damage in Williams' case. While we cannot condone an attempt to inject into the damages an element which neither has been pleaded nor proven, we note that the City failed to object to the remark.

This court has set forth the standard for reviewing an error which was not objected to at trial.

> Rule 46 of the Federal Rules of Civil Procedure retains the requirement that counsel make timely objection to the court. The Supreme Court, in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 239 [1940], held that counsel, during closing argument, "cannot as a rule remain silent, interpose no objections, and after a verdict has been returned seize for the first time on the point that the comments to the jury were improper and prejudicial." This court in *Thompson v. Boles*, 123 F.2d 487, 495-96 (8th Cir. 1941), *cert. denied*, 315 U.S. 804 [1942], adhered to the Supreme Court's ruling and held that . . . "[where an improper remark is made during closing argument], counsel may, and preferably should, make [the] objection, take [an] exception, or ask for remedial action at the close thereof and before the case is submitted to the jury." Only in extraordinary situations, in order to prevent a "plain miscarriage of justice," will a reviewing court reverse a judgment based upon errors not objected to at trial.

Lange v. Schulz, 627 F.2d 122, 127 (8th Cir. 1980), *see also Fed. R. Civ. P.* 61. By failing to object to the remark during closing argument, the City waived its right to object to the error on appeal.

E. Attorneys' fees.

Pursuant to the judgment, Williams' attorneys filed a motion for attorneys' fees in the amount of $19,250.00. The trial court reduced the amount requested for the work done by law clerks. The City argued that the award should be reduced because only one of the plaintiffs prevailed. The trial court found merit in this argument and, because it was impossible to distinguish between the time spent on the two claims, reduced the award by 25% for a final award of $13,338.30. After the original request for attorney fees had been filed, Williams' attorneys submitted a supplemental motion of costs and fees for $1,000.00, which allegedly reflected the time spent on post-trial motions. There is no indication, in the order awarding attorneys' fees, that the trial court considered this supplemental motion. On appeal, Williams objects to the court's reduction in fees and failure to consider the supplemental motion for fees. We affirm the trial court's award of attorneys' fees, but remand for a consideration of the supplemental motion submitted by Williams' attorneys.

The award of attorney fees is a matter entrusted to the sound discretion of the trial court, and we will not reverse a ruling on the award of fees unless the record clearly indicates that the court has abused its discretion. *Hensley v. Eckerhart*, — U.S. —, —, 103 S. Ct. 1933, 1941 (1983); *Bowman v. Pulaski County Special Sch. Dist.*, 723 F.2d 640, 646 (8th Cir. 1983). It must be remembered that one of the plaintiffs in this case failed on her claim entirely, and that both plaintiffs were represented by the same attorneys.

In *Hensley* the Court noted that the most critical factor in determining a fee award is the level of success ob-

tained by the prevailing party. *Hensley,* — U.S. at —, 103 S. Ct. at 1941. In reviewing which specific fee requests should be discounted from a total statement when a party has not prevailed on every claim, the "district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success. The court necessarily has discretion in making this equitable judgment." *Id.* We think this statement also applies to this situation, where only one of two plaintiffs represented by the same attorneys prevails. We think the district court's award of attorneys' fees was a fair one. Accordingly, we affirm the district court's ruling on the original request for attorneys' fees. However, because there is no indication that the district court considered Williams' supplemental motion in reaching its determination, we remand to the district court for a sole consideration of that motion.

F. The punitive damage award.

The jury awarded Williams $40,000.00 in compensatory damages and $60,000.00 in punitive damages. On the basis of *Newport v. Fact Concepts, Inc.,* 453 U.S. 247 (1981), the district court set aside the punitive damage award. Williams argues that this action was erroneous because the City failed to object to the punitive damage instruction during conference, and thus has waived the right to object to the award on appeal. *See Fed. R. Civ.* P. 51. We disagree.

The Supreme Court has held clearly that municipalities are immune from punitive damages under § 1983. *Newport,* 453 U.S. at 271. The Court reached this conclusion in *Newport* even though the city had failed to object to the punitive damages instruction. *Id.* at 253. We

recognize that since *Newport* some courts have held that a city waives the right to object to a punitive damage award on appeal if it failed to do so at trial. *See Barnett v. Housing Auth.*, 707 F.2d 1571, 1581 (11th Cir. 1983); *Black*, 662 F.2d at 184 n.1. We disagree with the positions taken by these courts. We hold that, under *Newport*, it would have been an error, as a matter of law, if the district court had failed to set aside the punitive damages award. *See Hart*, 720 F.2d at 1444.

In conclusion we affirm the judgment on the verdict, but remand for the trial court's consideration of the supplemental motion for attorneys' fees submitted by Williams.

McMILLIAN, Circuit Judge, dissenting.

I respectfully dissent. I believe that the majority has lost sight of the requirement that, in order to impose § 1983 liability upon a city, a *policy* or *custom* of the city must be the cause of the constitutional violation. I believe that a fair reading of *Monell v. Department of Social Services*, 436 U.S. 658 (1978), dictates the conclusion in the present case that Butler's act of terminating Williams cannot alone subject the city to § 1983 liability.

As the majority noted, the Supreme Court held in *Monell* that local governments can be sued directly under 42 U.S.C. § 1983 where "the action that is alleged to be unconstitutional implements or executes a governmental policy statement or custom." *Id.* at 690-91. My disagreement with the majority lies in its interpretation of the following critical and oft-cited sentence from *Monell:* "[I]t is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official pol-

icy, inflicts the injury that the government as an entity is responsible under § 1983." *Id.* at 694. I do not read the Court's words here, as the majority apparently does, to declare that any act of a city official to whom the city gave the discretion and final say-so to take such action, automatically becomes city policy, no matter how aberrant or personally motivated such action may be.

I fully agree with the majority that city policy or custom may, under certain circumstances, be made by individual officials, but I believe that the focus must always be whether the injury-inflicting act was a city policy or custom. Thus, it is actions taken by officials pursuant to delegated *policymaking* authority, as opposed to mere decisionmaking authority, that can subject the city to § 1983 liability.

In the present case, there was no evidence that Butler was delegated authority to set city personnel policy. Nor was it alleged that termination of employees who testified before a grand jury about their supervisors' alleged misconduct was a city custom.[1] The evidence only established that Butler had discretion to hire and fire his own personal staff and that termination of Williams was the result of a personal vendetta and not the result of a decision made on behalf of the city. I conclude that under the particular facts of this case, § 1983 liability cannot be imposed on the city purely on the basis of Butler's act.

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[1] I believe that the majority incorrectly analyzed the "custom" element of *Monell*. The question is not whether Butler "customarily" hired and fired his own staff, but whether the constitutional injury-inflicting act, i.e., firing an employee in violation of her first amendment rights, was a city custom.

I recognize that other circuits have adopted the strict "final authority" approach which the majority follows today.[2] Recently, however, as the majority notes, the Fifth Circuit has rejected this formula in *Bennett v. City of Slidell*, 728 F.2d 762 (5th Cir. 1984) (banc). The court there stressed that under *Monell*, a city's § 1983 liability "must rest on official policy, meaning the city government's policy and not the policy of an individual official." *Id.* at 769. The court went on to explain:

> The policy is that of the city, however, where it is made by an official under the authority to do so given by the governing authority. Hence culpable policy is attributable to the governing body of the city where the policy is made by an official to whom the governing body had given policymaking authority . . . . [T]he delegation of policymaking authority requires more than a showing of mere discretion or decision making authority on the part of the delagatee.

Id. See also Losch v. Borough of Parkesburg, 736 F.2d 903, 910-11 (3d Cir. 1984) (borough not liable under § 1983 for police chief's unconstitutional misuse of criminal process by initiation of criminal charges against plaintiff without probable cause for reasons of personal animosity even if police chief were final authority with regard to police activities); *Thomas v. Sams*, 734 F.2d 185, 192-93 (5th Cir. 1984) (city liable for mayor's causing plaintiff's arrest without probable cause to prevent plaintiff's interference with construction of sewer line because city entrusted to

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[2] I am somewhat troubled by the fact that the source of this reading of *Monell* appears to be a law review article rather than sound, independent judicial reasoning. More important, of course, is my belief that this theory represents a misreading of *Monell* and, in this case leads to an erroneous result.

mayor complete policymaking authority for all aspects of completing sewer line), *reh'g denied*, No. 82-2359 (Sept. 17, 1984). I believe this is the correct analysis to apply and would reverse the district court's judgment against the city in the present case.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX C

Debbie WILLIAMS and Linda Stanley,
Plaintiffs/Appellees Cross-Appellants.

v.

William R. BUTLER, Defendant,

v.

CITY OF LITTLE ROCK, ARKANSAS,
Third Party Defendant
Appellant/Cross-Appellee.

Nos. 83-2534, 83-2641

United States Court of Appeals,
Eighth Circuit.

Submitted April 30, 1985.

Decided May 13, 1985.

Appeal from the United States District Court for the Eastern District of Arkansas; William R. Overton, U.S.D.C. Judge.

Thomas Carpenter, Little Rock, Ark., for third party defendant appellant, cross-appellee.

Philip Kaplan, Little Rock, Ark., for plaintiffs, appellees, cross-appellants.

Before LAY, Chief Judge, FLOYD R. GIBSON, Senior Circuit Judge, and HEANEY, BRIGHT, ROSS, McMILLIAN, ARNOLD, JOHN R. GIBSON, FAGG and BOWMAN, Circuit Judges, en banc.

ORDER

The district court's decision is affirmed by an equally divided court. Chief Judge Lay, and Judges Floyd R. Gibson, Heaney, Bright, and Arnold vote to affirm the district court's decision. Judges Ross, McMillan, John R. Gibson, Fagg, and Bowman vote to reverse the district court's decision.

Appellee Williams, request for attorney fees is granted, with the following modification. Because appellee did not prevail on the punitive damages issue, the cost for services rendered will be reduced ten-percent to $8,055.00. The appellee's request for expenses in the amount of $1,068.79 is granted. Thus, the total award for fees and expenses allowed by the court is $9,123.79.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 83-2534
No. 83-2641

Debbie Williams and Linda Stanley,

Plaintiffs/Appellees/
Cross-Appellants,

v.

William R. Butler,
Defendant,

On Remand from the United States Supreme Court.

v.

The City of Little Rock, Arkansas,

Third-Party Defendant/
Appellant/Cross-Appellee.

Submitted: May 15, 1986

Filed: September 26, 1986

Before LAY, Chief Judge, FLOYD R. GIBSON, Senior Circuit Judge, HEANEY, Circuit Judge, BRIGHT, Senior Circuit Judge, ROSS, McMILLIAN, ARNOLD, JOHN R. GIBSON, FAGG, BOWMAN, WOLLMAN, and MAGILL, Circuit Judges, En Banc.

FLOYD R. GIBSON, Senior Circuit Judge.

This case is before the court on remand from the United States Supreme Court for further consideration in light of *Pembaur v. City of Cincinnati,* 106 S.Ct. 1292 (1986). The issue we must decide is whether, in light of *Pembaur,* municipal liability may be imposed upon the City of Little Rock under 42 U.S.C. § 1983 for the single unconstitutional discharge of a municipal court clerk by the municipal judge to whom the city had delegated final authority concerning employment matters involving municipal court personnel. We hold that municipal liability may be imposed upon the city in these circumstances.

I.

William R. Butler was an elected municipal judge for the traffic court of the City of Little Rock, Arkansas. The municipal traffic court was under investigation by a grand jury for possible corruption. Both Debbie Williams and Linda Stanley, municipal court clerks, had witnessed Butler deliberately destroy traffic tickets. After Butler learned that Williams told the police what she had witnessed, he fired her. After testifying before the grand jury as to what she had witnessed, Stanley allegedly was harassed until she resigned. Williams and Stanley filed suit in federal district court against Butler seeking damages and equitable relief pursuant to 42 U.S.C. § 1983 for violations of their first amendment rights. Although the plaintiffs named Butler as defendant in his official capacity, which in essence was a suit against the city, Butler filed a third-party complaint against the city alleging that it was responsible for any judgment against him. At the close of the evidence and in response to motions by the city, the district court found as a matter of law that Butler acted

in his official capacity and within the authority delegated to him by the city if he, in fact, had discharged Williams or Stanley. The court specifically found that the undisputed evidence demonstrated that Butler had been delegated policy-making authority by the city and that he was acting pursuant to that authority. The jury returned a verdict in favor of Williams on her claim against Butler, awarding her damages. The jury returned a verdict in favor of Butler, however, on Stanley's claim. Consistent with its ruling at the close of the evidence, the court entered judgment in favor of Butler on his third-party complaint against the city, and the city appealed.

On appeal, a panel of this court affirmed the district court's judgment that the city was liable for Butler's unconstitutional discharge of Williams. *Williams v. Butler*, 746 F.2d 431 (8th Cir. 1984) (Judge McMillian dissenting). The panel held that:

> (1) if, according to a policy or custom established by a governing body, an official is delegated the authority, either directly or indirectly, to act on behalf of a governing body; and (2) if a decision made within the scope of the official's authority ends the matter, then the acts of the official may fairly be said to be those of the local governing body.

Id. at 438. The panel decision was vacated, however, when a rehearing en banc was granted. On rehearing, the district court's decision was affirmed by an equally divided court. *Williams v. Butler*, 762 F.2d 73 (8th Cir. 1985). The Supreme Court granted the city's petition for a writ of certiorari and vacated the judgment of the en banc court, remanding the case to us for further consideration in light of *Pembaur v. City of Cincinnati, supra. City of Little Rock v. Williams*, 106 S.Ct. 1508 (1986).

II.

In *Pembaur* the plaintiff, an Ohio physician and proprietor of a medical clinic located in Cincinnati, Ohio, filed suit in federal district court against, among others, the City of Cincinnati and Hamilton County, seeking damages pursuant to 42 U.S.C. § 1983 for violations of his Fourth and Fourteenth Amendment rights. Doctor Pembaur alleged that his rights were violated when police forcibly entered his clinic to serve capiases on two of his employees. After meeting with resistance from Doctor Pembaur, the Deputy Sheriffs called the County Sheriff's office and were directed to call the County Prosecutor's office for instructions. Upon the prosecutor's instructions to "go in and get" the employees, the Deputy Sheriffs and city police obtained an axe and chopped down the door of the clinic. The Deputy Sheriffs searched unsuccessfully for the employees. Doctor Pembaur alleged that absent exigent circumstances the Fourth Amendment prohibited the officials from searching his place of business without a search warrant in an attempt to execute a capias on a third person.[1] The district court dismissed the complaint against both the county and the city, ruling that the county and city were not liable because the individual officers were not acting pursuant to "official policy" necessary to

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[1]In *Steagald v. United States*, 451 U.S. 204 (1981), decided the day after Doctor Pembaur filed his lawsuit, the Supreme Court held that absent exigent circumstances or consent an officer may not make a warrantless search for the subject of an arrest warrant in a third party's home. Defendant County of Hamilton did not challenge the retroactive application of *Steagald*. In fact, the county conceded that *Steagald* applied retroactively, and the Supreme Court decided the case in light of the county's concession. *Pembaur*, 106 S.Ct. at 1297 n.5.

impose municipal liability. On appeal, the Sixth Circuit reversed the district court's decision with respect to city policy,[2] and affirmed the court's decision concerning county policy, but for different reasons. The court of appeals held that, although pursuant to Ohio law the Hamilton County Sheriff and Prosecutor were authorized to establish official county policy, Pembaur had failed to prove the existence of county policy in this case. Pembaur failed to show "anything more than that, on this *one occasion,* the Prosecutor and the Sheriff decided to force entry into his office. That single, discrete decision is insufficient, by itself, to establish that the Prosecutor, the Sheriff, or both were implementing a governmental policy." *Pembaur,* 746 F.2d 337, 341 (6th Cir. 1984) (citation and footnote omitted) (emphasis in original).

The Supreme Court granted Pembaur's petition for writ of certiorari and reversed the Sixth Circuit's decision. The majority concluded that in the appropriate circumstances municipal liability may be imposed for a single decision made by municipal policymakers. The majority described four of those circumstances as follows: (1) when the single decision is made by the properly constituted legislative body—"because even a single decision by such a body unquestionably constitutes an act of official government policy." (citing *Owen v. City of Independence,* 445 U.S. 622 (1980); *Newport v. Fact Concerts, Inc.,* 453 U.S. 247 (1981)); (2) when the single decision is made

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[2]The Sixth Circuit held that the district court's finding that no city policy existed was clearly erroneous in light of the city police chief's testimony that the city police took whatever steps were necessary, including forcible entry, to serve warrants. 746 F.2d at 341.

pursuant to formal rules or understandings (citing the written rule in *Monell v. Department of Social Services,* 436 U.S. 658 (1978)); (3) when the single decision adopts a particular course of action tailored to a specific situation and is properly made by the government's authorized decisionmakers (citing *Owen* and *Newport, supra*); and (4) when the single decision is directed by those who establish governmental policy. *Pembaur,* 106 S.Ct. at 1298-99.

Under Ohio law, the County Sheriff and Prosecutor could establish county policy. The Deputy Sheriffs were following standard procedure when they sought instructions from the County Sheriff and Prosecutor. The Court ruled that "[i]n ordering the Deputy Sheriffs to enter [Pembaur's] clinic the County Prosecutor was acting as the final decisionmaker for the county, and the county may therefore be held liable under § 1983." *Id.* at 1301.

The Supreme Court recognized that the authority to make municipal policy often is spread among various officers and official bodies. The Court emphasized, however, that not every decision by municipal officers subjects the municipality to § 1983 liability. "Municipal liability attaches only where the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered." *Id.* at 1299 (plurality opinion) (footnote omitted). Justice Brennan, in his plurality opinion, phrased the Court's holding as follows: "We hold that municipal liability under § 1983 attaches where—and only where—a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." *Id.* at 1300 (cit-

ing *City of Oklahoma City v. Tuttle*, 105 S.Ct. 2427, 2436 (1985)).

In concurring opinions, Justices White and O'Connor focused on the policy of forcible entry of third-party property to effect an arrest warrant and reasoned that the decision to use force by the sheriff and prosecutor, authorized policymakers in this case, "sufficiently manifested county policy to warrant reversal of the judgment below." 106 S.Ct. at 1301 and 1304. In his concurring opinion, Justice Stevens focused on the fact that the unconstitutional acts were committed by municipal agents in the course of their employment. *Id.* at 1303.

Justice Powell was joined by Chief Justice Burger and Justice Rehnquist in dissent. Justice Powell took the position that no prior county policy existed and the offhand telephone response from a busy prosecutor amounted to a mere *ad hoc* decision, which cannot create a policy. *Id.* at 1309.

III.

In light of the Supreme Court's decision in *Pembaur*, we hold that § 1983 municipal liability may be imposed upon the City of Little Rock in this case. The record before us indicates that Butler was delegated final policymaking authority concerning employment matters in the municipal court, and that he acted pursuant to that authority when he chose to discharge Williams for exercising her first amendment rights. At the conclusion of the evidence the district court found that the undisputed evidence demonstrated that Butler was the policymaker with respect to employment matters in Little Rock Municipal

Court. The district court specifically found that the city delegated to Butler, as judge and chief administrative officer of the municipal court, the final authority for administering personnel decisions in the munncipal court. Butler "had the sole and exclusive control of the hiring, termination, discipline, [and] discharge of his employees." Transcript at 493-94. In response to the city's question whether Butler set policy, the district court stated: "I'm finding that they completely turned it over to him, and he operated it exclusively. Yes." The court added, "I think he not only set the policy, he did it all. I don't know how I could go into it other than just reaching that conclusion. The fact and the legal conclusion is that he did it all." Transcript at 494-95. The district court also found that Butler was acting in his official capacity if he in fact terminated the plaintiffs. The court therefore concluded that the city would be liable for Butler's conduct if the jury found that Butler violated the plaintiff's constitutional rights.[3]

The record amply supports the district court's finding that Butler possessed policy-making authority and was acting pursuant to that authority when he, as the jury found, discharged Williams. Therefore, we conclude that the district court's finding is not clearly erroneous. Butler admitted in his response to requests for admissions

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[3]The district court prepared a post-trial memorandum and order in which it clarified the findings it made at the conclusion of the evidence. The court listed the factual basis for its findings. The court stated that although Butler's staff was processed through the city personnel office, paid by the city, assigned city parking places, and worked in city buildings, Butler hired, controlled, and supervised his staff. No evidence was introduced to the contrary. Record at 271.

that his personnel served at his "sole pleasure" because of the city's policy of delegating to him the final authority in employment matters. He also admitted that he did not consult the personnel office or the City Board of Directors when he discharged Williams or any other clerks. Record at 164, 165.[4] Butler testified that after he was elected in 1969, he went to the personnel director, Coy Adams, to inquire about assembling a staff. Butler stated that Adams told him that "it had always been traditional that the City of Little Rock left it up to the judges of the courts." Transcript at 430. The personnel office was involved only to the extent that Butler would send his newly hired personnel to the office "to let an application be filed, and * * * to sign up for insurance." Transcript at 431. Butler had followed this procedure since he took office in 1969. Williams and a witness for Williams testified that they had been fired by Butler. The city introduced no evidence to the contrary. Indeed, it was the city's position at trial that Butler possessed the sole and exclusive authority and ultimate responsibility concerning employment matters in the municipal court. The city's sole responsibility, it argued, was paying the salaries. In its counterclaim, the city stated, "The City of Little Rock has always agreed with the plaintiffs' contention that defendant Butler is responsible for hiring and terminating his chief clerk and deputy clerks." Record at 124 (paragraph 7). In its brief in support of a motion to dismiss, the city argued that it was not empowered to hire or fire municipal court personnel. It was "defendant Butler *only*"

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[4]These were not self-serving admissions at the time Butler responded to the city's request. The city's position throughout the trial was that Butler, not the city, had exclusive control and ultimate responsibility with respect to employment matters in the municipal court.

who possessed such power. Record at 71-72 (emphasis in original). *See* Record at 252 (the city's post-trial brief); Record at 130 (paragraphs 8 and 9 of the city's answer in which the city denies that it had the power to reinstate the plaintiffs, and denies that Butler did not possess such power). We conclude, therefore, that the district court did not err in finding as a matter of law that Butler was the policymaker with respect to employment matters in the municipal court.

The city now argues that Butler was given only the discretion to hire and fire employees, and his decision to fire Williams was simply an unconstitutional exercise of that discretion, which cannot be attributed to the city. In support of its argument, the city calls our attention to footnote twelve of the *Pembaur* opinion. In footnote twelve, the plurality drew a distinction between an official who possessed mere discretion and one who possessed final policy-making authority, stating that only the acts of the policymaker will represent municipal policy and could give rise to municipal liability. The city's characterization of Butler's authority as merely discretionary is without merit. This characterization is contrary to the city's position at trial and also contrary to the evidence, as we have discussed in the preceding paragraphs. The record indicates that Butler possessed more than discretionary power; as the district court found, Butler "not only set the policy, he did it all."

Contrary to its position at trial and contrary to the evidence in the record, the city now argues that it never delegated the authority in question to Butler. The city's argument, even if true, does not help its position. Even if the city did not actually delegate the authority, the record amply demonstrates that the city acquiesced to it.

For at least fifteen years, and probably longer, Butler possessed and exercised *carte blanche* authority with respect to employment matters in municipal court.

By statute, municipal court judges are authorized to employ necessary court personnel. Ark. Stat. Ann. § 22-713 (Supp. 1985). The salary range for court personnel is set by statute, which also authorizes the city's governing body to set specific salaries within that range. Ark. Stat. Ann. § 22-704.1(45) (Supp. 1985). During oral argument, counsel for the city relied on the Arkansas Statutes and Exhibit 5 in support of the city's argument that the city possesses final authority concerning employment matters in municipal court. Exhibit 5 is a Status Change report, authorizing a change in plaintiff Williams' salary while she was employed as a clerk. Such reports usually contain three authorizing signatures: Butler's (in this instance apparently signed by the police department's business manager), the personnel director's, and the city manager's (in this instance signed by his secretary). The city argues that this document and the statute demonstrate that all employment decisions must be approved by the city, thereby making it the final authority with respect to employment matters. We disagree. At most the document demonstrates that the city, consistent with the statute, approves salary changes that are within the statutory range. Moreover, the city's argument here contradicts the position it took in its post-trial brief that it had no control whatsoever over the municipal court concerning employment matters:

> The Arkansas General Assembly * * * has authorized Judge Butler to employ persons to fill [the] staff positions. Inherent in the power to hire is the power

> to discharge or terminate. The Arkansas Constitution, Art. 7, Sec. 2, makes it very clear the legislative and executive branches of the City are not to interfer[e] with those powers in the municipal court. The City submits that the Court should find plaintiffs to be employees of the Court, and not employees of the City.

Record at 252.[5]

In this case, the unconstitutional act is that of the municipality, not merely that of one of its employees. Consequently, imposing municipal liability on the City of Little Rock is the result of a fault-based determination, rather than the application of *respondeat superior* principles. *See Pembaur,* 106 S.Ct. at 1298; *City of Oklahoma City v. Tuttle,* 105 S.Ct. at 2433-34 (plurality) (the purpose of *Monell's* policy or custom requirement is to require a determination of fault on the part of the municipality, not merely one of its employees). Butler's acts, pursuant to an unwritten policy, became the city's acts. The City of Little Rock certainly would have been liable if the city's governing body had made the decision to discharge Williams. *See Owen* and *Newport, supra.* In other words, if Butler had not possessed the final authority in this matter, if Williams had followed the grievance procedures available to employees outside the municipal court, and if the city's properly constituted governing body had upheld the discharge, then clearly the city would

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[5]Attached to Exhibit 5 is another Status Change report filed when Williams was hired. Counsel for the city also relied on this report in support of the argument that the city possesses the final authority concerning employment matters. In addition to the reasons we discussed above concerning Exhibit 5, we note that the signatures by the officials' assistants indicate that the authorization was pro forma and as a practical matter Butler possessed the final authority here.

have been liable for the governing body's action. We see no constitutional difference between imposing § 1983 liability on the city in those circumstances and imposing liability on the city where, as here, it has delegated that final authority to discharge employees to a policy-making official such as Butler.[6] Consequently, we hold that where, pursuant to municipal policy or custom, an official is delegated final policy-making authority, and acts unconstitutionally pursuant to that authority, the official's conduct may fairly be said to be that of the city, and the city may be held liable under § 1983.

IV.

In conclusion, the record amply supports the district court's finding that Butler possessed final policy-making authority with respect to employment matters in the municipal court, and that he exercised that authority when he discharged Williams. Consequently, in light of *Pembaur v. City of Cincinnati*, § 1983 liability may be imposed upon the City of Little Rock. Therefore, we affirm the judgment of the district court.

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[6]The constitutional violation in this case is not the result of a mere aberrant act by a person in a policy-making position. *See Pembaur*, 106 S.Ct. at 1302 (White, J., concurring) (municipal liability would not have attached had there been a statute or ordinance that provided the proper constitutional protection). To characterize Williams' discharge in this case as merely the result of an aberrant act ignores the finality of Butler's decisions with respect to employment matters. The record does not indicate that grievance procedures existed whereby municipal court personnel could appeal adverse employment decisions. Rather, the record indicates that as a result of an unwritten policy or custom, giving municipal judges final authority concerning municipal court employment matters, court personnel were subject to Butler's final decisions.

In the original appeal, issues were raised concerning punitive damages, attorney fees, remarks made during closing argument, and the admission into evidence of recorded conversations. These issues were not resubmitted to this court on remand from the Supreme Court, nor were they briefed, submitted and argued in this en banc hearing. We therefore consider them waived, or if not waived, we decide all but the attorney fees issue in accordance with the reasoning set forth in the original panel opinion. *See* 746 F.2d at 440-44. The attorney fees issue was decided by the court on the first rehearing en banc, and we decide that issue according to our reasoning in that opinion. *See* 762 F.2d at 73.

Costs assessed against the City of Little Rock.

ROSS, Circuit Judge, with whom JOHN R. GIBSON, BOWMAN, WOLLMAN, and MAGILL, Circuit Judges, join, dissenting.

For the third time,[1] this court holds the City of Little Rock liable for Judge Butler's unlawful decision to fire a court employee who helped expose Butler's corruption. In doing so, this court essentially holds that the City has a policy of firing employees who attempt to help the City uncover corruption. This decision was wrong the first two times. After the decision was vacated by the Supreme Court with instructions to read and apply *Pembaur v. City of Cincinnati*, 106 S.Ct. 1292 (1986), the decision is entirely unsupported. Based on *Pembaur*, this court should reverse the district court's finding in favor of Butler on his third party complaint against the City. Butler alone was re-

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[1]Once by the panel, once by this court *en banc* by virtue of a tie vote, and now by a majority vote.

sponsible for his firing decision and Butler alone should be held accountable.

In *Pembaur,* the Court held that "municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances." *Id.* at 1298. The Court then added:

> Having said this much, we hasten to emphasize that not every decision by municipal officers automatically subjects the municipality to § 1983 liability. *Municipal liability attaches only where the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered.* The fact that a particular official—even a policymaking official—has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of that discretion. * * * The official must also be responsible for establishing final government policy respecting such activity before the municipality can be held liable.

Id. at 1299-1300 (footnotes omitted, emphasis supplied). This policymaking requirement was illustrated in footnote 12 with an employment example directly applicable to this case:

> Thus, for example, the County Sheriff may have discretion to hire and fire employees without also being the county official responsible for establishing county employment policy. If this were the case, the Sheriff's decisions respecting employment would not give rise to municipal liability, although similar decisions with respect to law enforcement practices, over which the Sheriff is the official policymaker, would give rise to municipal liability. Instead, if county employment policy was set by the Board of County Commissioners, only that body's decisions would provide a basis for county liability. This would be true

> even if the Board left the Sheriff discretion to hire and fire employees and the Sheriff exercised that discretion in an unconstitutional manner; the decision to act unlawfully would not be a decision of the Board. However, if the Board delegated its power to establish final employment policy to the Sheriff, the Sheriff's decisions would represent county policy and could give rise to municipal liability.

Id. at 1300, n.12 (emphasis deleted).

In the case before us, Judge McMillian's dissent to the panel opinion stated that "there was no evidence that Butler was delegated authority to set city personnel policy." *Williams v. Butler,* 746 F.2d 431, 444 (8th Cir. 1984) (McMillian, J., dissenting). We now know that a municipality cannot be held liable for an employee's decisions absent such evidence. Because there is insufficient evidence to support a finding that Butler had the authority to make final employment *policy* for the City, as opposed to mere final employment *decisions* for the City, the City cannot be held liable for Butler's decision to fire Williams.

Even if Butler had somehow been given authority to make employment policy for the City, the facts in this case do not support a conclusion that Butler's vengeful and self-motivated decision to fire Williams actually created employment policy for the City. In my view, a policy decision is distinguishable from other types of decisions in that it results in "a general position that would govern future cases." *Pembaur v. City of Cincinnati, supra,* 106 S.Ct. at 1309 n.7 (Powell, J., dissenting). The City of Little Rock never adopted a policy of firing employees who attempt to help the city uncover corruption, and it certainly cannot be said to have adopted such a policy for general application in future cases.

A plurality of the Court in *Pembaur* adopted a different definition of the term "policy". According to the plurality, a policy decision simply involves "a deliberate choice to follow a course of action * * * made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." *Id.* at 1300. This standard was contained in Part II-B of the opinion. It received the approval of only four justices.[2] Moreover, one of the four, Justice White, interpreted the standard quite narrowly. In deciding to cast his vote with the majority, Justice White relied heavily upon the fact that the unlawful act committed in *Pembaur* (a forcible entry without a search warrant) was not unlawful at the time committed. Based on this fact, he found it reasonable to infer that the municipal officials' decision to commit the unlawful act was consistent with municipal policy. But this inference would not have been proper, Justice White continued, if the unlawful act had been illegal under federal, state, or local law at the time the act was committed. His point was demonstrated with the following statements:

> Local law enforcement officers are expected to obey the law and ordinarily swear to do so when they take office. Where the controlling law places limits on

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[2]The four concurring justices were Bernnan, White, Marshall, and Blackmun. Justice O'Connor joined in the judgment but refused her approval of Part II-B because of a "fear that the standard the majority articulates may be misread to expose municipalities to liability beyond that envisioned by the Court in *Monell*." *Id.* at 1305 (O'Connor, J., concurring). Likewise, Justice Stevens joined in the judgment but not Part II-B of the opinion. His refusal to join Part II-B was founded on his view that municipalities can be liable under a *respondeat superior* theory.

> their authority, they cannot be said to have the authority to make contrary policy. Had the sheriff or prosecutor in this case failed to follow an existing warrant requirement, it would be absurd to say that he was nevertheless executing county policy in authorizing the forceful entry in this case and even stranger to say that the county would be liable if the sheriff had secured a warrant and it turned out that he and the magistrate had mistakenly thought there was probable cause for the warrant. If deliberate or mistaken acts like this, admittedly contrary to local law, expose the county to liability, it must be on the basis of *respondeat superior* and not because the officers' acts represents local policy.

Id. at 1301-02 (White, J., concurring). Justice O'Connor expressed her agreement with Justice White's approach in a separate concurrence.

In the case before us, the unlawful act (retaliatory firing) was clearly unlawful at the time it was committed, and the municipal official who committed the act (a municipal traffic judge) was expected to obey the law and presumably swore to do so when he took office. As such, the judge "cannot be said to have [had] the authority to make * * * [employment] policy" which was inconsistent with the law. *Id.* at 1301. In other words, Butler's decision to fire Williams was "forbidden by * * * [the] law * * * [and was a decision] that [he] then had * * * [no] authority to make." *Id.* at 1302. As such, the City cannot be held responsible for Butler's aberrant act.

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EIGHTH CIRCUIT.